In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 1102

HARRY BLUMENTHAL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF HARRY BLUMENTHAL FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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Subject Index

Table of Authorities Cited

Statutes

Rules

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Harry Blumenthal for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

At the November, 1944, term of the Southern Division of the United States District Court for the Northern District of California, the grand jurors presented an indictment charging that the petitioner Harry Blumenthal and Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum

> "at a time and place to said grand jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of $25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Section 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 195 and Maximum Price Regulation 445."

As overt acts in furtherance of the conspiracy, the indictment alleges certain transactions which it is unnecessary to set forth. (Transcript of Record, p. 3, et seq.)

When called up to plead to this indictment, the appellant and petitioner Harry Blumenthal presented and filed a demurrer to the indictment. (T.R. 11-16.)

Subsequent to the filing of the demurrer and before the ruling of the Court thereon, Blumenthal presented and filed a motion to quash the indictment. (T.R. p. 16.)

On April 2, 1945, the District Court overruled the demurrer and denied the motion to quash, the appellant duly excepting to these rulings.

On May 15, 1945 the case came on regularly for trial before Honorable Louis E. Goodman, United States District Judge, with a jury. The evidence, the substance of which is set forth in the bill of exceptions, is not directed to the proof of the offense charged against the defendants, to-wit, conspiracy, but **consists entirely of testimony and documentary evidence relating to isolated transactions in no way connected with each other. There is no proof that any two of the defendants ever acted in concert with each other, Judge Denman of the Circuit Court of Appeals bases his dissenting opinion, from which we shall presently quote, upon this utter failure of proof.** There is no proof that any one of the defendants ever met or communicated either verbally or in writing, either directly or indirectly, with any other defendant. There is no evidence that at any time mentioned in the indictment, or before, or after, any one of the defendants even knew of the existence

of any of the others. These observations apply with peculiar force to Blumenthal.

Yet, solely for the reason that the defendants engaged in similar transactions, unrelated as these transactions were to each other, the Government asked the jury to draw the inference that there was a conspiracy, and the learned trial judge erroneously, as we shall presently show, ruled that there was enough evidence to warrant the submission of the case to the jury.

To the end that we may demonstrate that there is not even a scintilla of evidence tending to show, either directly or by any reasonable inference that might be drawn therefrom, that Harry Blumenthal was a party to the conspiracy charged in the indictment or any other conspiracy, we shall set forth the substance of the evidence in so far as it relates to him.

The first time that the appellant Blumenthal appears in the record, is during the direct examination of the witness James Cernusco, who testified that he had made a purchase of the brand of liquor mentioned in the indictment from a man who said he came from the Francisco Distributing Company, a wholesale liquor house. He gave this man two checks payable to the Francisco Distributing Company for $450 and $2000 respectively. The witness also gave this unidentified individual $6100 in cash. (T.R. 313 *et seq.*)

This testimony was repeatedly objected to by counsel for the appellant Blumenthal on the ground that it was hearsay, and not binding upon him. Toward the close of his direct examination, the witness testified: "I do not know Harry Blumenthal." (T.R. 307.)

On cross-examination Blumenthal stood up at the request of his counsel and the witness stated, **"I do not know this gentleman. I never did any Old Rocking Chair business with him."** (T.R. 307.).

The first witness who testified that he ever saw Blumenthal, or had any conversation or transaction with him, is Angelo Lombardi, whose testimony is in substance as follows:

"I am a tavern owner in Santa Rosa, and have operated that tavern since 1940, and was engaged in the operation of that tavern during December, 1943, and January, 1944. During those months I purchased 100 cases of 'Old Mr. Boston Rocking Chair Whiskey.' I did not give both check and cash to the same party. I paid cash for the whiskey to a fellow in The Sportorium on Third Street, between Mission and Market. I see that man in the courtroom, the man with the glasses, sitting down. (T.R. 353.)

(The witness identified the defendant Blumenthal.)

The Witness (continuing). I paid $3050 in cash to Mr. Blumenthal. It was between the 15th or 18th, somewhere around in there. I don't quite remember the date. I have brought invoices with me. I bought

100 cases of whiskey. About the 15th Mr. Minkler contacted me about the whiskey. Mr. Minkler was a tavern owner at Santa Rosa. He contacted me at my place of business. We went to San Francisco, and we bought this whiskey around the 18th of December. The first time we went to The Sportorium, I went to The Sportorium with Mr. Minkler. I did not see Mr. Blumenthal at The Sportorium the first time. I went into the Sportorium and Mr. Minkler went and talked to somebody and I stayed in front there looking at some fishing poles and things he had. Mr. Minkler went in the back room there. I didn't pay any attention. (T.R. 354.)

(To the Court). I did not see this man I was with talk to Mr. Blumenthal on that occasion. On that occasion I did not have any conversation with Blumenthal. After Mr. Minkler came out of this room, he said they got in contact with somebody and the whiskey was O.K. Then Minkler and I went back to Santa Rosa. We next came to San Francisco around the 20th of December. I am not exactly sure about the date. Around the 20th of December I came to San Francisco with Minkler. I went to The Sportorium with $3050 in cash. On that occasion I saw Blumenthal at The Sportorium. All three of us went together in the back room and paid the money to Mr. Blumenthal, laid it right on the shelf. No one else was in the back room beside Blumenthal and Mr. Minkler and myself. At that time I did not have any conversation with Mr. Blumenthal. I did not say anything as I gave him the money. I was

just leaving it all up to Minkler. I don't know whether Minkler said anything. I left, and they talked a little while. We left. They said, 'The whiskey will be up there in a few days.' Mr. Minkler said that. I went back to Santa Rosa with him. (T.R. 355.)

Q. What happened back at Santa Rosa regarding this transaction?

Counsel for the defendant Blumenthal objected to the question as hearsay and not binding on the defendant Blumenthal. The Court overruled the objection to which ruling counsel for the defendant Blumenthal excepted. (T.R. 355.)

The Witness (continuing). * * * We just left there; and Minkler went back to his own place of business and I went back to mine, and about 2 or 3 days after, he called up and says that the whiskey was on its way.

Counsel for the defendant Blumenthal objected to this evidence and to anything that happened between Minkler and the witness. The Court overruled the objection, to which ruling counsel for the defendant Blumenthal excepted. (T.R. 355.)

The Witness (continuing). I received a phone call from Minkler. He said, 'The whiskey will be up in a few days.' About Friday the whiskey arrived, 100 cases, by Sonoma-Marin Freight Company. That is my signature on the check for $2450 shown me. I wrote the check out and delivered it to the name on

there, Clyde Minkler. I wrote the check for $2450 at the instructions of Clyde Minkler.

I have seen the invoice now shown me of the Francisco Distributing Company, No. 10147-A. That came in about the first of January, in the mail. It was in the complete form that it is now, when I received it. The words 'Salesman Weiss' were on there when I received the document. I noticed them at the time. Since that time this document has been part of the files and records of my business. The records are kept by himself. (T.R. 356.)

The Witness (continuing). I received 100 cases of fifths of American Distillers Rocking Chair, Mr. Boston, blended bourbon about the 3d of January. I had no further transaction regarding the purchase of this whiskey. I last saw Mr. Minkler about last November. He sold out and went to New Mexico or some place. I have not seen him since approximately last November." (T.R. 356.)

Herman Fingerhut, the owner of a cafe in Vallejo, testified:

"During the months of December, 1943 and January, 1944 I purchased some Old Mr. Boston Rocking Chair Whiskey. I don't know the man's name from whom I purchased the whiskey at that time. I went to The Sportorium and contacted the man there. The place where I purchased this whiskey was The Sportorium. (T.R. 362.) I don't know the exact day, the first time I went in there, but I imagine it was the first part of December. I paid $55 a case for this

whiskey. As close as I remember, I first went to The Sportorium about the 3d or 4th of December. I seen a man there—I don't know his name. I think it is that man in the last row there, something similar to that man. I am referring to that man with the brown suit.

(To the Court). Mr. Blumenthal is the man I have in mind. That was the man I saw. On the occasion of my first visit to The Sportorium I went alone. I had a conversation with that man on that occasion. Just the two of us were present at the conversation. I imagine it was the early part of the afternoon. The conversation was regarding some whiskey. At that time I didn't know what kind of whiskey. All I knew I could get some whiskey. What it was I don't remember. I was not told. I told him I needed some whiskey. He told me he could probably get it for me. I said I could use some, and he asked me how many cases I could use. I said at the time around 200 cases. He said well, he could take care of me. He told me the price was $55. I had to pay $24.50 a case and make out a check for that and the rest was in cash. He told me he didn't know exactly when I could get the whiskey. He said he will get it in the latter part of the month, as soon as it comes in, if he would let me know. I had no conversation with him about the check, outside of him telling me to make out a check. The first check I made out was for $2000. I did not make it out on the occasion of my first visit. The first time there was no mention about a check at all, because the

first time I went to see him I did not know whether I could buy the merchandise, because it was too much money for me to pay. That is the only conversation we had the first time. He didn't say he would get in touch with me. He did not say to come back. I went home, and I told him if I decided I wanted to buy it, I would come back and see him. There was no further conversation the first time. Pursuant to that conversation I went back, I imagine 3 or 4 days after that, maybe a week; I don't know exactly. That would be something like the second week in December. Nobody went with me. On the second visit I went to The Sportorium on Third and Stevenson. I went alone. (T.R. 363.) I know where Market Street is in San Francisco; The Sportorium is one short block away from it. It is right on the corner of Stevenson and Third. On this second visit to The Sportorium I saw Mr. Blumenthal. I had a conversation with him regarding this whiskey. Just him and I was present. This was early in the afternoon. The conversation took place in the back of The Sportorium. I told him 'I am ready to buy some of that whiskey' but I could not handle 200 at the time, I could only handle 100, but I knew somebody who would take the other hundred cases. (T.R. 363-364.) He said that was all right. There was no other conversation, outside I told him who the other party was, a man by the name of Walter Travis. I didn't know what kind of whiskey it was going to be at that time. It was going to be a blend. He told me the whiskey was going to arrive about the end

of the month. He did not know exactly. There wasn't much said outside I told him I was going to take a 100, and Travis was going to take the other hundred, and then I give him a deposit on it of $4000 in the form of four one-thousand-dollar bills, which I got from the Bank of America right on Powell and Market, I think; I don't know exactly where. At that time he said he wanted cash now and the check would come a little later. He did not give me any instructions then regarding the writing of the check. The total cash payment from that conversation was $4000 then; I paid him $4000 the second time and I think we were supposed to pay him some more money later on. I was not taking 200 cases, I only took 100, so it only cost me $4000, and I think Mr. Travis gave him money later on, I believe. When I gave him the $4000, I said it was for 200 cases at that time. That conversation took a couple of minutes. (T.R. 364.)

(To the Court). All that transpired was I gave him $4000 in cash at that meeting. I had another meeting later on. Mr. Travis and myself were present at that meeting, which was a few days later, I think. I told him Mr. Travis was taking the other hundred. (T.R. 365.)

(To the Court). I won't say for sure I saw Mr. Travis pass over the money. All I do know is I said that Mr. Travis was going to take the other hundred and I was going to take that hundred, that's all. The third time I gave Mr. Blumenthal a check for $2000. He told me to make it out to the Francisco

Distributing Company for $2000. That one hundred cases of whiskey was delivered to me. (T.R. 365.) The 200 cases were delivered in one place, in Mr. Travis' warehouse, and I went and got my hundred from the warehouse. That was Old Mr. Boston Rocking Chair whiskey. This invoice of the Francisco Distributing Company (marked U. S. Exhibit 52 for identification) came into my possession before I got the whiskey. I got this from the man at The Sportorium, after I give him the $2000; he give me this and I owed him the balance of $450.

(To the Court). I paid that on a check; the $450 was in a check to the Francisco Distributing Company. I don't know about this 'G' with a line under it on the face of that document.

(To the Court). I didn't put it on after I got it. It is in the same condition as when I first got it. I made a later purchase of Old Mr. Boston Rocking Chair Whiskey about the 3rd or 4th of January. (T.R. 365.) I purchased that whiskey from the same place and from the same man. I bought 25 cases. I paid for that whiskey $55 a case. I received that whiskey about a week later. I think a week or two later, I don't remember exactly. Mr. Travis give me an invoice of the Francisco Distributing Company, now shown me, No. 10151, which is now shown me. I don't know where he got it, but he give it to me as soon as he come back from the city.

The Witness (continuing). That invoice arrived before I received the 25 cases of whiskey. The 25

cases of whiskey came together with—there was 100 altogether, and Travis got 75 and I got 25. I don't know the exact date when that did come. He received it. I give my money to Mr. Travis to bring down, because I didn't come down to San Francisco anymore.

(To the Court). I talked with Mr. Blumenthal about buying 25 cases. I don't remember the exact date. All I know is I got a telephone call wanting to know if I needed any more whiskey.

The check now shown me (U. S. Exhibit 54, marked for identification) on the Bank of America, Vallejo Branch, for $4000, payable to 'Cash', is in my handwriting. I signed it myself. I made it out at the bank. I think the one on Powell and Market, Bank of America. It is marked here, 'November 24'. I cashed it in, and got $4000 for it. That is the $4000 to which I have referred. The date of that was November 24, 1943. I made out the check now shown me dated December 9, 1943. That is my signature that appears thereon. I made that out at The Sportorium on December 9, at the instruction of the man who was with me. He told me to make the check payable to the Francisco Distributing Company, for $2,000. Mr. Travis was with me at that time. At the time I gave the check to Mr. Blumenthal for $2,000, I gave him $1,050 in cash. (T.R. 367.)

I made out the Bank of America check now shown me, dated December 12, 1943. That is my signature thereon. I made that check out at home. I mailed

it to the Francisco Distributing Company at the direction of the man from The Sportorium. There was a balance of $450, and I was told to mail that later on. I don't think he told me what date. I received the invoice of the Francisco Distributing Company (U. S. Exhibit 52 for identification) from the man at The Sportorium. I believe he wrote that 'Received $2000' and 'Balance $450.' When he handed me this invoice he said, 'you just owe $450, and that is all at this time.' That was not the time he told me write that $2000 check—the $450—no. I don't know just when he told me to write it. I wouldn't say for sure. I paid no more money in any way than that which we have named for the first 100 cases that I bought during the month of December. The Bank of America check now shown me to Francisco Distributing Co. for $612, I wrote out at home. That is my signature that appears thereon. I wrote it about December 30, I believe, at home. After I wrote the check I give it to Mr. Travers (Travis). I gave Mr. Travis some cash. I don't remember how much right now. The difference between that and $24.50 and $55—this check is made out for 25 cases at $24.50 a case, and the whiskey cost $55, and the difference I gave him in cash. (T.R. 368.)

Walter H. Travis, another witness called by the Government, testified:

"I am a tavern owner. The name of my tavern at that time was Lou's Place, 717 Sonoma Street, Vallejo. I operated that place during the months

of December 1943 and January 1944. During that time I purchased some Old Mr. Boston Rocking Chair Whiskey from a gentleman in The Sportorium on Third Street. I see that gentleman here, in the court-room (pointing out the defendant Blumenthal). I bought 175 cases of Old Mr. Boston Rocking Chair Whiskey from Mr. Blumenthal. I bought those in separate parcels twice. I bought 100 cases on the first occasion, I paid $55 a case, $5500 for that whiskey. I recognize Government's for Identification No. 44, check for $2000. That is my check. I wrote it, and that is my signature. After I wrote it I carried it to The Sportorium on Third Street in San Francisco. I did not write it in The Sportorium. I carried it in there. I wrote the check about December 9. I was told to make it out to the Francisco Distributing Company by the gentleman at The Sportorium. (T.R. 373.) No part of the check was written in The Sportorium. That check was not written at the time of my first visit to The Sportorium. It was written the second. The date of my first visit to The Sportorium was somewheres around the 9th of December. Mr. Fingerhut went with me on that occasion. 'Government's for Identification No. 55' is not my check. I did not write any of Government's for Identification No. 44, check for $2000, at The Sportorium. I wrote that check at my office in Vallejo about the 9th of December. I don't know that there was anyone present beside myself when I wrote the check. Mr. Fingerhut told me to write that check. That check was entirely made out

when I arrived at The Sportorium. When I took the check and the money I had a conversation with Mr. Blumenthal on that occasion. That was the occasion of the 9th to which I have just referred. That was the occasion of my first visit; no one else was present at that conversation beside myself and Mr. Fingerhut and Mr. Blumenthal. It was just before noon. The conversation was that we come and pay the money to get delivery of the whiskey. The name of the whiskey was mentioned, I think. I think it was named; we could get 100 cases of Rocking Chair Whiskey that was what was said. We was to send him a check for $450. Mr. Blumenthal said that he told me to send the check to The Sportorium. I had to take $1050 down at the time I took this check. He just said that we would have to pay $2450 for the 100 cases by check to the Francisco Distributing and the $1050 to him in cash. On the occasion of that conversation I gave $1050 to Mr. Blumenthal. I did not have any further conversation with him at that time. I have seen that check for $450, Government's for Identification No. 43. That is my check. I wrote it at my office. That is my signature. I mailed it to Mr. Blumenthal to The Sportorium. I have seen this Francisco Distributing Company invoice No. 10086. I saw that for the first time when I delivered the check and the money. That was on the occasion of my first visit to The Sportorium. Mr. Blumenthal gave me that invoice. He wrote this '$2000, balance $450.' He wrote that in my presence, 'Received on account

$2000; balance due $450.' Since that time this invoice has been part of the files of my business. I keep them in my custody. (T.R. 375.)

The foregoing constitutes the only evidence produced by the Government affecting Blumenthal in any manner whatsoever.

A great mass of evidence, however, was admitted over the repeated objections of petitioner on the ground that the same was not binding as to him, relating to transactions in which the other defendants were involved. No pretense was made that this appellant participated in any of these transactions, and the learned trial judge, during the course of the trial, specifically limited the scope of such evidence, and admitted it solely as against the defendant to whom it related.

At the conclusion of the Government's evidence a most unusual proceeding, and one the like of which we have never heard before, was adopted by the United States Attorney. He made a motion (T.R. 390-391) to admit all of the testimony that had been taken and all of the documents that had been received either in evidence or for identification, against all of the defendants. This motion was strenuously resisted by counsel for the defendants. Mr. Friedman, who appeared as counsel for the defendant Feigenbaum, objected to each and every bit and portion of this evidence, stating specific grounds therefor, and when his objection was overruled by the Court, made a motion to strike out all of

this evidence. (T.R. 392-409.) The petitioner, as well as all of the other defendants, joined in Mr. Friedman's objection, and in a motion to strike, which was likewise denied by the trial judge, and exceptions noted. (T.R. 410.). The proceedings upon this motion of the United States attorney, the objections thereto, and the motion to strike out the evidence objected to, are set forth in full in the transcript, under appellant Feigenbaum's Assignment of Errors XVII (T.R. 106, *et seq.*), also in the Bill of Exceptions. (T.R. 391-421.) They need not be reiterated here. It is sufficient to state that the chief and all-important point in the objections was that the *corpus delicti* had not been proven, because there was no evidence tending to establish the formation or existence of any conspiracy, and that, accordingly, any acts or declarations of the alleged conspirators were inadmissible, not only as against the other defendants, but even as to the defendant to whom they related.

All of these objections were overruled, and all of the said motions denied by the trial Court, with the single exception heretofore noted, that the testimony of the witness Harkins was admitted only as against the defendants Weiss and Goldsmith.

Thus, evidence which had been originally admitted as against only one defendant was summarily received as evidence against all the other defendants, whose counsel, relying upon the original limitations which specifically held the evidence not admissible against their respective clients, had refrained from

cross-examining the witness. The unfairness of this procedure, which was in effect a denial of the right of cross-examination, is palpable, at first blush, but we reserve further comments thereon to the portion of the supporting brief which will be devoted to the argument.

At the conclusion of all the evidence, counsel for the petitioner Blumenthal moved the Court for an instructed verdict of "Not Guilty". This motion was denied and an exception taken. (T.R. 424-427.)

Thereafter the cause was argued by counsel, the Court delivered its charge (T.R. 429, *et seq.*), and the jury thereafter returned the verdict finding each of the defendants guilty. (T.R. 464.)

Petitioner's motion for a new trial was denied (T.R. 46) and thereupon he was sentenced to pay a fine of $1000, and be imprisoned for a period of eight months. Thereafter appellant duly appealed to the Circuit Court of Appeals for the Ninth Circuit. (T.R. 60.) That Court on December 16, 1946, rendered an opinion affirming the judgment. (T.R. 482.) Petitioner on January 13, 1947, filed a petition for a rehearing with the Circuit Court of Appeals. On February 28, 1947 (T.R. 499) the following order was made:

"The petition for a rehearing is denied.

"William Healy,
United States Circuit Judge

"Homer T. Bone,
United States Circuit Judge

"DENMAN, Circuit Judge, dissenting:

"The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the Court's opinion filed on December 16, 1946."

The dissenting opinion (See T.R. 500) contains the following language applicable to this appellant:

"The statement of facts of the Court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

"Abel, Blumenthal and Feigenbaum are shown to have been black marketeers and should have been prosecuted for selling whiskey at over ceiling prices. **Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice.** Cf. Kotteakos v. United States, 328 U.S. * * *, 90 L. Ed. 1178, 1183.

"The Court's opinion is bare of facts, as is the evidence,

"(1) That any of these three knew or was in any communication with any others of them;

"(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

"(3) That any of the three sellers knew that any other of them bought the whiskey from the

so-called "common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, **but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;**

"(4) That any knew that any other bought his whiskey at the same below-ceiling price;

"(5) **That any knew that any other sold his whiskey at the same or similar over-ceiling prices.**

"The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the Court's opinion used each of Abel, Blumenthal and Feigenbaum **separately** as his agent to violate the law. This would constitute several separate conspiracies between the unproved owners and each of the proved sellers, but not a conspiracy among all four of them.

"The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of Kotteakos v. United States, 328 U. S. . . ., 90 L. Ed. 1178, 1181, and Canella v. United States, 157 F. 2d 470, 477."

JURISDICTIONAL STATEMENTS.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. (28 U.S.C.A. Sec. 347.)

2. The decision and judgment of respondent Circuit Court of Appeals was rendered December 16, 1946. (T.R. 482.) A petition for a rehearing was denied by the Circuit Court of Appeals February 28, 1947.

3. The bases upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are in part as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court or of another Circuit Court of Appeals on the same matter, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (See: Rule 38, Section 5(b), Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U.S. 252, 85 L. Ed. 1313, 61 S. Ct. 866; *Helvering v. Price*, 309 U.S. 409, 60 S. Ct. 673, 84 L. Ed. 836; *National Licorice Co. v. National Labor Relations Board*, 308 U.S. 535, 60 S. Ct. 108, 84 L. Ed. 451; *Lane v. Wilson*, 305 U.S. 591, 59 S. Ct. 249, 83 L. Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (See: Rule 38,

Section 5(b), Rules of the Supreme Court; *Postal S. S. Corporation v. El Isleo*, 308 U.S. 378, 60 S. Ct. 332, 84 L. Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo*, 297 U.S. 530, 56 S. Ct. 580, 80 L. ed. 844; *Le Tulle v. Scofield*, 308 U.S. 531, 60 S. Ct. 75, 84 L. ed. 447; *McNabb v. United States*, 318 U.S. 332, 87 L. ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 62 S. Ct. 966, 86 L. ed. 1336; *Williams v. Jacksonville Terminal Company*, 314 U.S. 590, 62 S. Ct. 64, 86 L. ed. 476; *National Labor Relations Board v. Express Publishing Company*, 312 U.S. 426, 61 S. Ct. 693, 85 L. ed. 930; *Sprague v. Ticonic National Bank*, 306 U.S. 623, 59 S. Ct. 463, 83 L. ed. 1028.)

THE QUESTIONS PRESENTED.

The questions presented and specifically brought forward by this petition for the issuance of a writ of certiorari are as follows:

1. That the evidence was insufficient to justify the verdict, that the trial Court erred in denying the

motion of petitioner to instruct the jury to render a verdict finding them not guilty, and that the Circuit Court of Appeals erred in deciding adversely to this contention of petitioner.

2. That the Circuit Court of Appeals erred in refusing to reverse the judgment of conviction for the error of the trial Court in admitting in evidence against this petitioner evidence of acts and declarations of alleged co-conspirators without any proof of conspiracy which is the *corpus delicti* of the offense.

3. That the conviction is void because a conspiracy to violate a regulation adopted by the Price Administrator is not punishable under the General Conspiracy Act. (18 U.S.C.A. Sec. 88)

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has rendered a decision contrary to the applicable decisions of this Court and of the several Circuit Courts of Appeals, including its own prior decisions, upon the precise question here involved.

The dissenting opinion of Judge Denman in the Court below, we submit, correctly states the law applicable to this case.

The questions heretofore stated are questions of grave importance and the Circuit Court of Appeals has so far sanctioned such a departure by the lower Court from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision.

The foregoing reasons and questions are argued at large in the annexed brief filed in support of this petition.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause therein depending entitled Harry Blumenthal, et al., Appellants v. United States of America, Appellee, and numbered 11232; and that the judgment of the said Circuit Court of Appeals may be reviewed by Your Honors and the judgment thereof reversed; and that your petitioner have such other and further judgment, order or relief as to this Honorable Court shall seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
March 21, 1947.

HUGH K. MCKEVITT,
Attorney for Petitioner.

MORRIS OPPENHEIM,
Of Counsel.

Certificate of Counsel.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am of counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 21, 1947.

Hugh K. McKevitt,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

HARRY BLUMENTHAL,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF OF HARRY BLUMENTHAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE OPINIONS DELIVERED IN THE COURT BELOW.

The opinion of the Circuit Court of Appeals was delivered December 16, 1946. (This opinion is not yet reported but is set forth in the transcript, page 482.) A petition for a rehearing was denied February 28, 1947. Circuit Judge Denman dissented from the order denying a rehearing, withdrew his concurrence in the original decision and filed a dissenting opinion which is set forth in the transcript. (Page 500.)

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These are fully set forth in the foregoing petition for a writ of certiorari (pages 22, 23) under the heading, "A Summary and Short Statement of the Matter Involved," and, to avoid repetition, and in the interest of brevity, are here omitted.

STATEMENT OF THE CASE.

This is likewise fully set forth in the foregoing petition (page 2, *et seq.*) and in the interest of brevity, is here omitted.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

These are likewise set forth in the foregoing petition under the heading, "The Questions Presented and the Reasons Relied On for the Allowance of the Writ," and restatement thereof is here omitted in the interest of brevity.

ARGUMENT.

I. THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT AND THE TRIAL JUDGE THEREFORE ERRED IN DENYING THE MOTION OF PETITIONER TO INSTRUCT THE JURY TO RETURN A VERDICT OF NOT GUILTY.

The testimony and other evidence taken at the trial, relating to the petitioner, Blumenthal, is fully set forth in the annexed petition for a writ of certiorari.

The evidence presented by the Government, if believed by the jury, tended to show the following facts:

The defendant, Goldsmith, doing business under the name and style of Francisco Distributing Company, was a duly and regularly licensed wholesale liquor dealer holding the permits required by law to do business as such. The appellant, Weiss, acted as a salesman for this concern. In the month of December, 1943, the Francisco Distributing Company purchased from an eastern concern, known as the Penn Midland Import Company, a carload of a brand of liquor known as Old Mr. Boston Rocking Chair Whiskey. The testimony further tends to show that the defendants, Blumenthal, Feigenbaum and Abel, had certain transactions relating to this whiskey with various persons who testified as witnesses for the Government. As pointed out in the statement of the case contained in the foregoing petition, as well as in the dissent of Judge Denman, **there was not the slightest evidence that these three defendants were acquainted with one another or that any of them had any knowledge of what the others were doing or even knew of their existence.** The *modus operandi* followed by these three defendants was similar and was, in brief, as follows: There was, at that time, a very great shortage of whiskey in San Francisco and the surrounding area, and the commodity was in great demand. Proprietors of restaurants, taverns and bar rooms were willing to pay almost any price for the commodity. The three defendants last named on two or more occa-

sions were approached by persons looking for whiskey. The intended purchaser was told that the whiskey was obtainable and that it would cost him a sum considerably in excess of the alleged ceiling price. The purchaser was directed to make out a check to the Francisco Distributing Company for a price somewhat below the alleged maximum or ceiling price **(this maximum price was never proven)**, and to pay an additional amount in cash to the defendant who participated in the transaction. Thereafter, the whiskey would be delivered.

As pointed out in the dissenting opinion of Circuit Judge Denman, there is not the slightest evidence that any of the cash paid to any of the said three defendants in any of the transactions was ever "cut up" with the Francisco Distributing Company operated by the appellant, Goldsmith.

There is, likewise, absolutely no evidence of any conspiracy between this petitioner and Feigenbaum and Abel, or either of them.

Each of the transactions testified to **was a separate and distinct transaction between the appellant involved and the purchaser of the liquor.**

If any conspiracy was established at all, it was between the defendant involved in the transaction and the purchaser, and not between the defendant involved and any of his co-defendants.

The evidence, viewed in the light most unfavorable to this petitioner, shows merely this: That Blumenthal sold some of the whiskey mentioned in the indict-

ment to the witnesses, Travis, Fingerhut and Lombardi. The substance of all of the testimony relative to the transactions of Blumenthal, is set forth in the foregoing petition (pages 7 to 17). These men dealt with Blumenthal alone. It appears that the whiskey was in the possession, actual or constructive, of the Francisco Distributing Company, which was conducted by the appellant, Goldsmith, and that appellant caused the purchaser, in each of these instances, to make a check out payable to the order of that concern. In addition thereto, the purchaser, in each instance, paid an additional sum to Blumenthal. There is not the slightest evidence, however, that any part of this additional sum went to anyone other than this petitioner. In other words, the evidence failed to show any concert between petitioner and Goldsmith as to the charging of this additional amount. The sum paid to the Francisco Distributing Company was indisputably **under** the so-called "ceiling price" of the whiskey. The record is destitute of any evidence that Goldsmith knew that Blumenthal was charging the additional amount mentioned, or that there was any agreement between them that such additional amount was to be charged. As far as the other defendants are concerned, there is no shred of evidence in the record that Blumenthal knew any one of them or ever participated in any of their transactions, or had any knowledge of the same. What the Circuit Court of Appeals has actually done is to take the separate transactions of the various defendants, and, because Feigenbaum, for example, sold some of the whiskey

in the same manner as Blumenthal, has held that the jury had the right to infer that there was a conspiracy, merely because of the similarity of the *modus operandi*. The Circuit Court of Appeals, we submit, has merely piled inference upon inference, which, under the most elementary rules of evidence, cannot be done, because an inference must be founded upon a proven fact and not upon another inference.

That evidence of this character is insufficient to convict under an indictment charging a general conspiracy in which all of the defendants participated, is squarely and decisively held by this Honorable Court in the recent case of *Kotteakos v. United States*, 90 L. ed. (Advance Opinion) 1178, 66 S. Ct. 1239. The opinion of the Circuit Court of Appeals, referring to the *Kotteakos* case, merely states that, in the case at bar,

> "the jury was justified in inferring that the appellants were parties to a single agreement and conspiracy to commit the offenses charged in the indictment, and that the overt acts established in the evidence were done and performed by appellants to further and carry into execution the objects and purposes of the conspiracy."

To state the matter otherwise—the Circuit Court of Appeals has held that because the jury **found** that there was a conspiracy, therefore the evidence **showed** that there was a conspiracy.

This we submit, is the pronouncement of a legal *non sequitur*. We further submit that the Circuit Court

of Appeals has assumed its hypothesis and that the foregoing language is the sheer *ipse dixit* of the learned author of the opinion.

Kotteakos v. United States, supra, is indistinguishable from the case at bar. In the *Kotteakos* case the indictment charged a general conspiracy in which a number of people operating through a common key figure, Simon Brown, were to make applications to various financial institutions for credit with the intent that the loans or advances would then be offered to the FHA for insurance upon applications containing false and fraudulent information. Seven of the defendants charged were found guilty. The evidence established that several applications for such loans had been made through the key figure Brown, but as this Honorable Court states, "no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction."

Following the foregoing language this Honorable Court says:

> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. Cf. United States v. Falcone, 311 U. S. 205, 85 L. ed. 128, 61 S. Ct. 204; United States v. Peoni (C.C.A. 2d), 100 F. 2d 401; Tinsley v. United States (C.C.A. 8th), 43 F. 2d 890, 892, 893. The Court of Appeals aptly drew

> analogy in the comment, **'Thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a "fence" to make them such.' "**

The *Kotteakos* case does not stand alone. The same rule is followed in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. ed. 1314, *Wyatt v. United States*, 23 Fed. (2d) 791, *Parnell v. United States*, 64 Fed. (2d) 324. Each of the two cases last cited clearly holds that an indictment for one large conspiracy is not sustained by proof of several smaller conspiracies participated in by some of the alleged conspirators.

In the very recent case of

Fiswick v. United States, decided December 9, 1946, 90 L. ed. (Adv.) 183, 189,

this Honorable Court reversed a conviction of conspiracy because the lower Court did the very thing done by the trial judge in the case at bar, that is, admit evidence of the acts and declarations of each defendant against all of his co-defendants. The opinion of the Court, written by Justice Douglas, contains the following language:

> "It is true, as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not

implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admissions the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos v. United States*, 328 U.S. ....., 90 L. ed. ....., 66 S. Ct. 1239, supra. With the admissions, the charge of conspiracy received powerful reenforcement. And the charge that each petitioner conspired with the others became appreciably stronger, **not from what he said but from what the other two said.** We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. * * * And the admissions so strongly bolstered, a weak case that it is impossible for us to conclude the error can be disregarded under the 'harmless error' statute. The use made of the admissions at the trial constituted reversible error."

The *Kotteakos* case also held that there was a fatal variance between the allegations of the indictment and the proof, and that the doctrine of harmless error could not be invoked.

As far as the petitioner Blumenthal is concerned, the evidence against him, assuming it all to be true, shows nothing more than that he agreed with the buyers, Fingerhut and Travis, to sell above the ceiling price. If he conspired with anyone it was with them, and with them alone.

This Honorable Court (*United States v. Norris*, 281 U.S. 619, 74 L. ed. 1076) has doubted that the buyer and seller of whiskey can be co-conspirators as a matter of law; but whether they can or not, we most assuredly have no evidence here of a conspiracy between anyone else than the buyer and the seller, and that conspiracy is not charged in the indictment.

In *Canella v. United States*, 157 Fed. (2d) 470 the Circuit Court of Appeals for the Ninth Circuit reversed the conviction of two of the defendants appealing from a judgment finding them guilty of conspiracy to defraud the United States on the ground that the evidence showed, not one conspiracy, as charged in the indictment, but several conspiracies, with some of which two of the defendants were not concerned. The Court says *inter alia*:

> "In the instant case there are at least five separate conspiracies. In the Berger case, supra, the Supreme Court stated that the objection to proving several separate conspiracies where only one is alleged, was not that the indictment did not describe the particular conspiracy of which the defendant was convicted, but that the Government's proof included more. (295 U.S. 81, 55 S. Ct. 629, 79 L. Ed. 1314.) * * *"

Citing *Kotteakos v. U. S.*, supra, the Circuit Court of Appeals proceeds:

> "'When many conspire, they invite mass trial by their conduct. * * * (but) wholly different is it with those who join together with only a few * * *. **Criminal they may be, but it is not**

the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it.' 66 S. Ct. 1252."

It is worthy to note that both Judge Healy, who concurred in the majority opinion in the instant case, and Judge Denman, who dissented, concurred in reversing the conviction in the *Canella* case.

II.

THE CIRCUIT COURT OF APPEALS HAS ERRED IN UPHOLDING THE ERROR OF THE TRIAL JUDGE IN ADMITTING AGAINST PETITIONER, OVER HIS OBJECTION, THE EVIDENCE OF THE ACTS AND DECLARATIONS OF HIS ALLEGED CO-CONSPIRATORS.

At the conclusion of the case for the Government the trial judge over the objection of petitioner (T. R. 390-409) admitted all evidence which had been offered against any defendant as against all of the defendants, and denied the motion of counsel for petitioner to strike out all of the evidence so admitted. (T. R. 396.) Thus there was admitted in evidence a vast mass of testimony relating to transactions participated in by the other defendants named in the indictment and by various other persons not charged at all*—transactions in which Blumenthal took no part, and of which there was not a word of evidence tending to establish that he had any knowledge—all this without

*Evidence was admitted of alleged sales made by three unidentified persons, not shown to have had any connection with any defendant on trial. (T.R. 301-2; 345, *et seq.*; 348 *et seq.*)

any proof of any conspiracy or that petitioner Blumenthal was a member of any conspiracy. It needs no citation of authorities to support the elementary proposition that before any acts or declarations of any alleged co-conspirator are admissible against or binding upon the accused, it must be shown that he was a member of the conspiracy.

Kassin v. United States, 87 Fed. (2d) 183.

Even knowledge of the conspiracy without active participation therein is insufficient.

Young v. United States, 48 Fed. (2d) 26;
Tingle v. United States, 38 Fed. (2d) 573;
State v. Naylor, 113 W. Va. 446, 168 S. E. 489;
Turcott v. United States, 21 Fed. (2d) 829;
Jianole v. United States, 299 Fed. 496;
Greenspahn v. United States, 298 Fed. 736;
Lucadamo v. United States, 280 Fed. 653.

Unless and until it was established by the evidence that a conspiracy had been formed, and that the defendant was a member thereof, no act or declaration of an alleged conspirator was admissible in evidence against him. The law in that behalf is well stated by the late Justice Richards in *People v. MacPhee*, 26 Cal. App. 218, 224, 146 Pac. 522, where it is said that:

> **"Such proof cannot consist merely in the acts and declarations of the alleged co-conspirators, but must be in the nature of an independent showing as to the existence of the conspiracy."**

As we have heretofore shown, at great length and with the citation of numerous authorities, and with

the quotation of lengthy excerpts from the evidence, there is not a shred, not even the veriest pretense of a showing, that any conspiracy was ever entered into between any of the defendants, much less that Blumenthal was ever a member thereof.

We are well aware that numerous decisions hold that it is unnecessary in prosecutions for conspiracy to prove that the alleged conspirators held a meeting and entered into a formal or express agreement that they would commit a particular crime. We have no quarrel with this rule, which is one of necessity, because in most cases it would be impossible to prove a formal agreement. But that is quite a different thing from saying that no proof of an agreement is necessary. There must be, as stated in some of the opinions heretofore cited, some evidence of a meeting of the minds, some evidence of at least a tacit understanding among the alleged conspirators, that they would act in concert with a view to the commission of the substantive offense. But here there is no such showing. While it is true that Blumenthal, if the Government's testimony is to be believed, used a *modus operandi* similar to that employed by some of the other defendants, there is an utter want of evidence that Blumenthal had any knowledge whatever of what any of his co-defendants ever did; indeed, there is an entire failure of proof that he ever knew or had even heard of any of those who were indicted jointly with him.

This being so, no act or declaration of theirs could prejudice him.

The learned trial judge fell into the error of believing that because different persons did acts of a similar nature, a jury would be warranted in inferring that they acted in collusion with each other. Such, we submit, is not the law.

It would be just as logical to argue that because five different persons, each single-handedly, held up five different banks on five different occasions, and that they all happened to buy their pistols from the same hardware store or sporting goods establishment, they could be found guilty of a conspiracy to commit the crime of robbery, without any showing of any concert between them or that they had ever met or even knew each other. No lawyer, we think, who valued his reputation for sanity would argue that such evidence would sustain a conviction of conspiracy; yet that is the very result that has been achieved in the case at bar through the error of the learned trial judge in submitting to the jury as a question of fact, what he should have determined himself as a question of law.

This Honorable Court has enunciated and enforced the same principle in *Glasser v. United States,* 315 U. S. 60, 86 L. ed. 680.

In prosecutions for conspiracy the conspiracy itself is the *corpus delicti.* (*Shannaberger v. United States,* 99 Fed. (2d) 957, 961; *Cartello v. United States,* 93 Fed. (2d) 412; *Tingle v. Uniter States,* supra; *Young v. United States,* supra; *Langer v. United States,* 76 Fed. (2d) 817.) Until that is established, no acts or declarations of alleged co-conspirators are admissible. (*Glasser v. United States,* supra.)

III.

THE INDICTMENT, VERDICT AND JUDGMENT ARE VOID BECAUSE CONSPIRACY TO VIOLATE A PRICE REGULATION IS NOT PUNISHABLE UNDER THE GENERAL CONSPIRACY STATUTE (18 U.S.C.A. 88).

Petitioner by motion made in the District Court to quash the indictment (T. R. 16) made the point that since the Emergency Price Control Act makes it a misdemeanor to **agree** (conspire and agree are one and the same thing) to violate the price regulations, it was clearly the intention of Congress that such an agreement was punishable exclusively under the Price Control Act, and that persons who conspired to violate regulations, made pursuant to that act were not amenable to the penalties of the General Conspiracy Act. Such a construction, we submit, is the only fair and just construction of the statute. It must be borne in mind that the Emergency Price Control Act is a war measure, valid and constitutional only because enacted in the exercise of the war powers conferred on Congress by the Constitution of the United States. It is avowedly, and is so designated by its own title, an emergency measure. The regulations adopted and promulgated thereunder are the acts of an administrative officer. They prohibit the doing of things which are not only not *mala in se*, but which, in normal times, the return of which the President of the United States has proclaimed by his proclamation of December 31, 1946, declaring hostilities at an end, are legitimate business transactions, which, far from being reprehensible, have always been regarded as commendable. It is but fair to presume that Congress did

not intend to inflict upon those who agree to do acts ordinarily proper and lawful, penalties as harsh as those imposed upon persons who conspire to commit infamous crimes against the United States, or in some manner to defraud the United States. That this is a proper construction of the penal provisions of the Price Control Act is apparent from the analogy of other statutes, such as the Sherman Act. Sections 1 and 2 of that Act are to all intents and purposes identical with Sections 4 (a) and 205 (b) of the Price Control Act. Such a construction has been placed upon the Sherman Act by the Courts. *United States v. Kissel*, 173 Fed. 823, 825, *United States v. Patterson*, 201 Fed. 697, 723. In the first of these cases Judge Holt says:

> "This indictment is necessarily brought under the provisions of the Sherman Act. * * * **Nor could this indictment have been brought under Section 5440 of the United States Revised Statutes**, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman Act, and **there cannot be a conspiracy to engage in a conspiracy.**"

CONCLUSION.

It is respectfully submitted that the opinion of the Circuit Court of Appeals is directly contra to the applicable decisions of this Court and that important questions of statutory construction, and the funda-

mentals of criminal evidence and orderly criminal procedure, are involved, and that a clear case is presented for the exercise by this Honorable Court of its supervisory powers, to which end a writ of certiorari should be granted.

Dated, San Francisco, California,
March 21, 1947.

HUGH K. MCKEVITT,
Attorney for Petitioner.

MORRIS OPPENHEIM,
Of Counsel.